

by Margaret Doyle

Getting on Stream with Online Mediation

It's a truism to say that technology is helping us break down borders – geographical, cultural, physical. But new methods of communication do hold a genuine promise, not least in how we resolve disputes. Some courts in the UK are now offering videoconferencing, and solicitors are embracing teleconferencing, as ways to increase access and cut down on the costs and strains of travel. Although they are not without drawbacks, the internet and teleconferencing are exciting new tools for mediators; more important, they can make mediation more accessible to a wider range of parties. There are many forms of what is now becoming known as ODR: online dispute resolution. They include mediation, med-arb, arbitration, ombudsmen, early neutral evaluation, and online 'courts'. I focus on mediation here.

What is it?

Online mediation basically has two forms:

- **Automatic settlement** negotiations ask each party to submit, in confidence, their bottom line. The computer program compares the offers and allows parties to resubmit offers that will bring them closer together. Once the offers reach a set range (such as within 5% of each other), the program splits the difference and offers this as the settlement. As a sort of de-personalised horse-trading, this process is suitable for 'money only' claims. An example can be found at www.cybersettle.com

- **'Content-based'** online processes involve using e-mail, instant messaging and other systems for communicating with the parties, jointly or separately.

I want to focus on content-based online mediation here, both because it offers great potential for settling a wide range of disputes and because it draws on the same skills that most of us working in 'offline' mediation already have.

Who does it?

There are several providers of content-based ODR, some based in the States and some here in the UK. Two examples are:

- **SquareTrade**, a San Francisco-based company, which contracts with business-to-business and business-to-consumer online marketplaces such as eBay (the online auction house) to provide an online dispute resolution service. For eBay, SquareTrade mediates disputes among buyers and sellers online. It has a huge international volume of cases (more than 30,000 cases in 80 countries) and about 250 mediators as part of its network. Complainants from eBay pay \$15 to initiate mediation, and

there is no time limit. SquareTrade's process provides for the mediator to recommend an equitable settlement if no mediated resolution is reached, if the parties agree for the mediator to do so. The system uses a specially designed, online, secure, web-based message system which is accessed via the SquareTrade website.

- **e-Mediator** is the online process offered by Consensus Mediation, based in Norwich. Parties pay from £75 plus VAT each, allowing for up to 6 hours of the mediator's time. The mediators on Consensus's

panel are trained by Centre for Dispute Resolution (CEDR), the Academy of Experts and ADR Net and have a range of backgrounds. The system uses e-mail, combined, where appropriate, with telephone and fax.

Why mediate online?

Maggie Kennedy, who runs Consensus Mediation, feels that electronic mediation is suitable where the cost and time of bringing people together makes a face-to-face meeting unfeasible. For many of the disputes that can

be resolved online, there is no other suitable venue, perhaps because the parties are too far apart. "It brings some of the benefits of face-to-face to a conflict that otherwise wouldn't have any of the benefits," she says.

Aside from issues of physical or geographical access, the fear of a face-to-face meeting can be daunting for some parties. They might feel they won't fare well in a meeting with the other side, or that they cannot articulate their concerns. Some parties find it useful to be able to take their time to

Case studies

Case 1

Mr K was the winning bidder at an auction of an antique chair. His bid was for \$300, and the cost of shipping the chair was an additional \$150. When he received the chair, however, he was disappointed because it was quite low – he described it as a "child's chair" – and he asked for a refund of his bid and the cost of shipping. He felt that the chair had been inaccurately described in the auction description and photograph.

The seller, Ms Y, said she was surprised at the complaint because she had described the chair accurately, had submitted a photo which accompanied the description, and had given the measurements, including those of the legs, of the chair. She felt the chair was worth more than Mr K paid for it, and she felt that because she could resell it she would offer a refund of the bid amount, plus an additional \$50. She said that she was willing to do this because, although she had not been in the wrong, she was a regular trader and wanted to be sure her customers were happy.

The mediator checked the auction description and photograph. In confidence, she told Mr K that it appeared that the appropriate measurements had been given. She also acknowledged his distress and disappointment. She let him know of Ms Y's offer, and said that she was aware that it would make Mr K responsible for the shipping costs. She asked him to consider what solution would suit him best. Mr K was unhappy with Ms Y's proposed solution because it would mean him paying for the shipping both ways, a cost of \$300. Although he did not accept that the description had been adequate, he did accept Ms Y's opinion that the chair would resell for more than his original bid, and he agreed to resell the chair himself in order to recoup his costs.

Case 2

Mr B bought at auction a scooter that was described as a major brand name. When he received it, he discovered that it was not the brand that had been described. He complained to the auction site and agreed to try mediation. He was angry and felt that he had been cheated.

The seller, Mr D, explained that he had described the scooter as a particular style,

not brand. He felt he had not misled bidders by using a style description that was the same as a popular brand name because he had given the model number. He felt that buyers should have known from the model number that it was not that particular brand. He was angry at being accused of acting with deceit.

The mediator checked the auction description and found that it was the only one of many scooters up for auction that was described in such a way. She acknowledged that both parties felt angry and hard done-by. She suggested that there had been a misunderstanding, and that it did not seem to her that anyone was acting with deceit. She asked them for proposals as to what they both wanted to do.

In the end, after many messages of negotiation, they agreed that the seller would provide a refund in exchange for return of the item in its box, that the buyer would pay the mediation fee of \$15, and that if all went well the buyer would write to the seller thanking him for making good.

formulate a response or propose a solution, and because online mediation does not take place in 'real time' it can allow such reflection. "Online mediation provides everybody with an opportunity to have an alternative method of resolution, playing on their strengths, not their weaknesses," Kennedy says.

There is also a growing recognition that conflicts that arise online – such as auction transactions and other e-commerce – should be dealt with online. In the US, the Federal Trade Commission and the Department of Commerce have consulted on the use of ODR for consumer disputes. In the UK, ADR is being explored for cross-border consumer disputes within Europe. The European Commission is currently considering what offline ADR schemes exist in each member country, but it has recently included online methods as well, and has proposed an accreditation scheme for firms offering online dispute resolution.

So what now?

Online mediation is a new process, one that is based on 'traditional'

mediation but departs from it. It should be embraced as an additional tool, one that will suit some circumstances and not others. I recommend that mediators consider both how they can incorporate e-mail and the internet into the practice, and how they can help develop good practice in electronic mediation.

But beware the pitfalls...tread softly, and carry a big mouse.



Wider Impact on Mediation Practice

The development of ODR will likely have an impact on offline ADR, and it might be one that is unwelcome. One downside of online mediation is that it operates in a competitive rather than cooperative environment. E-commerce providers look at online dispute resolution as a customer service. Investors want to know what sets out one ODR provider from another. SquareTrade, for example, has a patent pending on its unique technology which allows for internet, not e-mail, messaging. They are, justifiably, rather secretive about their technology.

In an article on ODR by Dan DeStephen and John Helie, published on www.mediate.com, this difference in ethos is explained:

"In technologist terms, the ADR community has been operating in an 'Open Source' development relationship, more like LINUX than Windows. In 'Open Source', the basic code of the operating system is shared, along with the innovations. We encourage others to excel and try to give them something that will help them succeed. The sharing of practice that has characterized the current community of dispute resolution is at risk in a highly competitive Internet

marketplace. It may be a while before the ODR community comes together to share innovations." (From 'On Line Dispute Resolution: Implications for the ADR Profession', which can be found on www.mediate.com.)

In fact, the authors suggest that ODR is likely to shift the balance away from cooperation and toward secrecy among providers. For some mediators this competitive ethos will be such a departure from the fundamental principles that inform our practice that it will make working in ODR unattractive. For others, it won't be as off-putting.

On the plus side, the ability of online dispute resolution to excite press and public attention can be a boost for offline mediators. DeStephen and Helie note that "the web's capacity to disseminate information about ADR throughout the world is one of its greatest assets. Even if the business plans are wrong, ADR services will significantly gain from the research, marketing, exposure and creative energy flowing into the field." Of course, this is only a benefit if parties are getting quality dispute resolution with which they are satisfied.

Mediating Online: How Does it Feel?

How is online mediation different from the face-to-face version? At first, it feels like a very alien process. There are none of the cues, such as body language and tone of voice, making it harder both to intuit what is behind the parties' words – motivations, emotions, attachments – and to convey empathy. It is easy to misunderstand and be misunderstood in the electronic environment.

Yet there is something that's not so alien after all. As with face-to-face, you are encouraging parties to be clear and say what they want to achieve, what their priorities are, what they can offer the other side. As with shuttle mediation, you are conveying messages back and forth and must be careful to check out what you pass on, in terms of accuracy and confidentiality.

What is perhaps most surprising is the level of emotional content to the cases. My experience has been with SquareTrade's dispute resolution service for eBay sellers and buyers. The cases I've handled have ranged in value from \$4 to \$4000. Yet no matter the money value, the investment the parties give to the dispute is huge. Many other issues come into play in the online environment, particularly one as intense as online auctions. Pride, reputation, trust, hurt feelings – all have featured in the cases I've dealt with. Parties often need a lot of encouragement to keep going, as they do with offline mediation. They also need to have a sense that their grievances are being acknowledged by the other side.

The process used online is identical to that in offline, but each stage is condensed. After receiving the initial complaint and response, I introduce myself and the process to the parties in a joint statement that explains the voluntary nature of the mediation and the rules of confidentiality. I usually ask the parties each for more information or to clarify something. As in a shuttle mediation, I do a fair bit of passing messages back and forth, reframing where necessary. The parties are asked to communicate only through the mediator, although up to the point when a mediator is assigned they have been negotiating directly with each other. Since it is not occurring in 'real time', both the mediator and the parties have ample time to compose their messages.

SquareTrade has a 'sample language chart' from which mediators can draw. This includes messages covering frequently encountered circumstances, contributed by other SquareTrade mediators. It's a great timesaving device and a handy tool.

A major difference from offline mediation is that in many of these disputes, parties ultimately want a resolution. They do not have an ongoing relationship and might never have dealings again, and for many of them there is no other ODR option but this mediation. So the nature of the relationship lends itself to a process sometimes referred to as 'conciliation' in which, if mediation doesn't achieve a resolution, the parties can choose to have a recommendation from the mediator. They then decide whether or not to accept this recommendation. Once they accept it, it becomes a binding settlement.

Links

Mediators interested in being involved with SquareTrade's service should explore the website at www.squaretrade.com. SquareTrade offers a free online training course.

Consensus is at www.consensus.uk.com, a site containing useful information and links.

Further ODR reading can be found on www.mediate.com, which contains articles and information and which also has an ODR service, and on www.spidr.org, the website of the Society of Professionals in Dispute Resolution, which has an online sector with discussion forum.

Margaret Doyle has been a mediator in the 'offline' world for 13 years. She completed the SquareTrade online mediation training program, and since October 2000 has worked as a SquareTrade Online mediator. She is also ADR policy and development officer at Advice Services Alliance and is the author of 'Advising on ADR: The essential guide to appropriate dispute resolution'. She can be contacted on 020 7236 6022, or by email at asa@cwcom.net.